Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 4 OF 1989
HAIDAR J
4 JANUARY 1990

Civil Procedure — Appeal — Memorandum of — Whether appellant must file and serve memorandum on respondent — Subordinate Courts Rules 1980, O 49 rr 2(1) & 3A — Rules of the High Court 1980, O 55 r 2(1)

This is a civil appeal by the appellant/defendant against the judgment of the learned sessions court judge in respect of the admission of goods sold and delivered in the sum of $37,230.15 pursuant to O 22 r 3 of the Subordinate Courts Rules 1980 ('SCR'). Notice of appeal was filed and a copy served on the respondent/plaintiff. Notification in the form of a letter was served on the appellant's solicitors by the registrar of the subordinate courts pursuant to O 49 r 3A(3) of the SCR. The record of appeal was filed and served on the respondent's solicitors on the same day. However no memorandum of appeal has been filed by the appellant's solicitors and served on the respondent's solicitor till todate. The preliminary issue in this appeal is: must the appellant file and serve the memorandum of appeal on the respondent? Counsel for the appellant submitted that the law is silent on this requirement.

Held, deciding the issue in favour of the respondent:

(1) There is a clear oversight when O 49 of the SCR was amended in 1988 to provide for cases of appeal where the appellant is represented and where the appellant is not represented or appeals as a poor person by not looking at and examining the necessity of making the consequential amendment at the same time to O 55 r 2(1) of the Rules of the High Court 1980 ('RHC') in respect of the appellant who is represented, in order to give effect to the distinction envisaged in the amendment to O 49 of the SCR in 1988. It is absurd to interpret that there is a necessity for the appellant who is unrepresented to file a memorandum of appeal and in respect of an appellant who is represented, there is no such requirement in the face of O 55 rr 3 and 4 of the RHC.

(2) Order 55 r 2(1) of the RHC can be interpreted, so as to do justice, by inserting the words 'or within six weeks from the receipt of the notification referred to in O 49 r 3A sub-r 3 of the Subordinate Courts Rules 1980 as the case may be', after the words 'O 49 r 3 sub-r (2)' in O 55 r 2(1) of the RHC. If those words are inserted, it means that the appellant who is represented will have six weeks to file the memorandum of appeal in line with the period prescribed under O 49 r 3A(3) of the SCR where the appellant who is represented will have to file the record of appeal as well.

(3) An appellant who is represented must therefore file a memorandum of appeal within six weeks from the receipt of the notification from the court appealed from that the certified notes of evidence and the grounds of judgment are ready under O 49 r 3A(3) of the SCR.

Cases referred to

1 *Nothman* v *Barnet London Borough Council* [1978] 1 WLR 220 (folld)
2 *Khoo Kay Por* v *Ooi Ean Kwong & Anor* [1980] 1 MLJ 92 (refd)
3 *United Hokkien Cemetries, Penang* v *The Board, Majlis Perbandaran, Pulau Pinang* [1979] 2 MLJ 121 (refd)

Legislation referred to

Rules of the High Court 1980 O 55 rr 2(1), 3, 4
Subordinate Courts Rules 1980 O 49 rr 2(1), 3(1), 3A

Paul Tang for the appellant.
Kilat Beriak for the respondent.

Cur Adv Vult

Haidar J: This is a civil appeal by Kuching Pharmacy Sdn Bhd, the appellant/defendant against the judgment of the learned sessions court judge in respect of the admission of goods sold and delivered in the sum of $37,230.15 pursuant to O 22 r 3 of the Subordinate Courts Rules 1980 ('SCR').

Judgment was delivered on 18 January 1989. Notice of appeal was filed on 28 January 1989 and a copy thereof served on the respondent/plaintiff on 30 January 1989. Notification in the form of a letter dated 13 April 1989 was served on the appellant's solicitors on 18 April 1989 by the registrar of the subordinate courts pursuant to O 49 r 3A(3) of the SCR. The record of appeal was filed on 22 May 1989 and served on the respondent's solicitors on the same day. However, no memorandum of appeal has been filed by the appellant's solicitor and served on the respondent's solicitor till todate. The preliminary issue raised by the respondent's counsel at the outset of the hearing of this civil appeal is — must the appellant file and serve the memorandum of appeal on the respondent? Mr Kilat submitted that the appellant must do so. Mr Paul Tang submitted that the law is silent on this requirement.

Order 49 of the SCR was amended in toto in 1981 vide PU(A) 127/81. Order 49 of the SCR as amended vide PU(A) 127/81 was further amended in 1988 vide PU(A) 67/88. The latest amendments in O 49 of the SCR vide PU(A) 67/88 are emphasized as follows:

> 1 *Rule 2(1)*
> Appeals to the High Court shall be brought by giving notice of appeal in Form 140. *A copy of such notice with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court.*
>
> 2 *Rule 3(1)*
> When the appellant has complied with the requirements of rule 2 of this Order, *and the appellant is not represented by a solicitor* or the High Court has allowed ...

The marginal note was at the same time amended to read: 'Appeal record where appellant is not represented or appeals as a poor person'.

> 3 *Rule 3A*
> (1) *When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of —*
> (a) *the relevant pleadings;*

(b) *the notes of evidence;*
(c) *the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;*
(d) *the decision;*
(e) *the notice of appeal;*
(f) *all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.*
(2) *If the appellant shall consider that any documentary exhibit used need not be included in the record he shall obtain the consent in writing of all parties to the appeal to the omission of the document from the record. Such written consent shall be included in the appeal record.*
(3) *Two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.*
(4) *The appellant shall at the time of filing the record serve a copy thereof on each party who has been served with the notice of appeal.*

Under the original O 49 of the SCR, r 5(1) requires the filing of a petition of appeal. The old r 5 reads:

(1) Within 21 days after service of the notice referred to in rule 4(2), the appellant must, if he desires to proceed with the appeal, file in the Registry a petition of appeal in duplicate in Form 142 and a copy of the petition must be served on every respondent to the appeal or his solicitor.
(2) Every petition of appeal must be signed by the appellant or his solicitor and shall contain concisely and under distinct heads, without argument or narrative, particulars of the matters of law or of fact in regard to which the Court is alleged to have erred, such particulars to be numbered consecutively, and, except with the leave of the High Court, the appellant shall not be permitted on the hearing of the appeal, to rely on any ground of appeal other than those set out in the petition.
(3) If a petition of appeal is not filed within the time prescribed by paragraph (1), the appeal shall be deemed to have been withdrawn, but nothing in this rule shall be deemed to limit or restrict the powers of extending time conferred upon the High Court.

However under the amended O 49 of the SCR (PU(A) 127/81), the provision relating to the requirement of the filing of the memorandum of appeal is silent and apparently deleted (including the old Form 142) as it is already provided for under O 55 r 2(1) of the Rules of the High Court 1980 ('RHC'). Further, under the amended O 49 of the SCR (PU(A) 69/88), a distinction is drawn between parties that are unrepresented and represented where under r 3, in respect of unrepresented parties, the court appealed from shall prepare the requisite number of copies of the appeal record and the record shall contain documents as specified under (a), (b), (c), (d), (e) and (f) thereof and under r 3(A)(1), in respect of represented parties, the onus is placed on the appellant to prepare the record of appeal and the documents as specified under (a), (b), (c), (d), (e) and (f) thereof. The intention here, in my view, is to ease the unrepresented parties of the burden of preparing the record of appeal and the necessary documents that need to be filed in the record of appeal and imposing such responsibilities to the court appealed from as compared to represented parties who have the benefits of their solicitors to do the appeal record for them. However, in respect of the unrepresented parties, O 49 rr 3(2) and (4) does not specify the period in which the record of appeal shall be filed in the High Court and for service of it on the respondent or respondents as it would appear to be covered by O 55 r 2(2) of the RHC whereas O 49 r 3A(3) and (4) of the SCR specifies that two copies of the appeal record shall be filed in the High Court within six weeks of the receipt of the notification from the court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready and the appellant shall at the time of filing the appeal record serve a copy thereof on each party who has been served with the notice of appeal, meaning, I take it, to be the respondents.

It is to be noted, however, that provisions relating to appeal from the subordinate courts are also prescribed under O 55 of the RHC. Apparently, when amendment was made to O 49 of the SCR in 1981, an amendment was made also in 1981 vide PU(A) 126/81 to rr 2(1) and 3 of the RHC. The amended r 2(1) reads:

The appellant shall, within fourteen days from the date of service on him of the notice referred to in Order 49 rule 3 sub-rule (2) of the Subordinate Court Rules 1980 or within such extended time as the High Court may allow, file in the High Court in duplicate a memorandum of appeal in Form 113A.

In respect of r 3 of the RHC, there is only a slight amendment where after the word 'notice', the following was inserted ' in Form 113B'.

The form of petition of appeal (Form 142) and the form of the respondent's notice (Form 143) in the original O 49 of the SCR were deleted in 1981 vide PU(A) 127/81 and instead we now have the form of memorandum of appeal (Form 113A) and the form of notice of cross-appeal (Form 113B) in the RHC vide PU(A) 126/81.

The necessity of filing a memorandum of appeal, in respect of whether the party is represented or not, is obvious if we look at rr 3 and 4 of O 55 of the RHC which would appear to be of general application. However, O 55 r 2(1) of the RHC specifying the time for filing of a memorandum of appeal to within 14 days or within such time as the High Court may allow, from the date of service on him of the notice referred to in O 49 r 3(2) of the SCR, is an obvious reference to cases where the appellant is unrepresented in view of the new r 3A of O 49 of the SCR. Apparently there is a clear oversight when O 49 of the SCR was amended in 1988 to provide for cases of appeal where the appellant is represented and where the appellant is not represented or appeals as a poor person by not looking at and examining the necessity of making the consequential amendment at the same time in 1988 to O 55 r 2(1) of the RHC in respect of the appellant who is represented, in

order to give effect to the distinction envisaged in the amendment to O 49 of the SCR in 1988.

The present r 2(1) of O 55 of the RHC may appear to apply to the appellant irrespective of whether he is represented or not as the reference to O 49 r 3 sub-r (2) of the SCR therein is in reference to O 49 prior to its (O 49) amendment in 1988 wherein the record of appeal will have to be prepared by the court appealed from. The situation has become somewhat anomalous when amendment was made to O 49 of the SCR by the new r 3A in 1988. In view of the lacuna in O 55 r 2(1) of the RHC, is the court going to say that there is nothing it can do about it? In my view, it is absurd to interpret that there is a necessity for the appellant who is unrepresented to file a memorandum of appeal and in respect of an appellant who is represented, there is no such requirement in the face of O 55 rr 3 and 4 of the RHC and prescribed Forms 113A and 113B. In both prescribed Forms 113A and 113B at the bottom of both said forms are clearly written the following words:

Appellant
Solicitor for the Appellant

Order 55 r 2(1) of the RHC, at least, clearly envisages the requirement of filing a memorandum of appeal but should it, as O 55 r 2(1) stands, be applicable only to an appellant who is unrepresented? In interpreting rules of this nature, assistance may be sought from the proposition of Lord Denning in the case of *Nothman* v *Barnet London Borough Council* at p 228:[1]

> The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'. He said so in *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1971] AC 850, 899; and it was recommended by Sir David Renton and his colleagues in their valuable report on the Preparation of Legislation (1975) Cmnd 6053, pp 135/148. In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judge can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.

The above passage was quoted with approval not only by Arulanandom J in the case of *Khoo Kay Por* v *Ooi Ean Kwong & Anor* at p 94[2] but has been quoted with approval by the then Federal Court in the case of *United Hokkien Cemetries, Penang* v *Majlis Perbandaran, Pulau Pinang* at p 123.[3]

In the light of the above cases, it seems to me a sensible interpretation can well be put upon O 55 r 2(1) of the RHC. The said provision can be interpreted, so as to do justice, by inserting the words 'or within six weeks from the receipt of the notification referred to in O 49 r 3A sub-r 3 of the Subordinate Courts Rules 1980, as the case may be', after the words 'O 49 r 3 sub-r (2)' in O 55 r 2(1) of the RHC. If those words are inserted, it means that the appellant who is represented will have six weeks to file the memorandum of appeal in line with the period prescribed under O 49 r 3A(3) of the SCR where the appellant who is represented will have to file the record of appeal as well. My view is further fortified by O 55 r 2(2) which requires the appellant within the like period to serve each respondent *with a copy of such memorandum and a copy of the appeal record*. If the words suggested are not inserted therein, we are not giving effect to the provisions in O 55 rr 3 and 4 of the RHC, thereby giving rise to an absurd and unjust situation. The requirement of the appellant to file the memorandum of appeal is further supported by a similar provision under r 62(1) of the Rules of the Supreme Court 1980 in respect of appeal from the High Court to the Supreme Court. The object of the necessity of the memorandum of appeal is obvious so that the respondent and the appellate court will know the grounds of objection to the decision appealed against and that no party is caught by surprise. My view is fortified if we look at the provisions under rr 3 and 4 of the RHC regarding cross-appeal by a respondent and the amendment. In my view, by inserting those words, everything fits together. Such a construction will 'provide the general legislative purpose' underlying the provision so as to do what the Rules Committee would have done, had they had the situation in mind.

In the result, I would rule that an appellant who is represented must file a memorandum of appeal within six weeks from the receipt of the notification from the court appealed from that the certified notes of evidence and the grounds of judgment are ready under O 49 r 3A(3) of the SCR.

In view of my ruling and as it is not disputed that a memorandum of appeal has not been filed in this case by the appellant who is represented by a solicitor, I would in fairness to Mr Paul Tang invite him to address me on the effect of my said ruling and in view of the provision of O 55 r 4(3) of the RHC.

Order accordingly.

Solicitors: *Ibrahim & Co Advocates*; *Chew, Jugah, Wan Ullok, Goh & Co Advocates.*

Reported by *Kevin Mathews*